FILED
MAY 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

2

No. 05-1240

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE,

*Petitioner.*

*v.*

CITY OF CHICAGO KRISTEN KATO
AND EUGENE ROY,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604

(312) 427-3200
*Attorney for Petitioner*

# INDEX

Introduction ..... 1

Each Question in the Petition Was Presented to and Passed Upon by the Court of Appeals ..... 3

The Limitations on Damages and the Conflict with *Heck v. Humphrey,* 512 U.S. 477 (1994) ..... 5

The Seventh Circuit's Limitation on Damages Cannot Be Separated from the Accrual Question ..... 7

Conclusion ..... 8

## TABLE OF AUTHORITIES

*Beck v. City of Muskogee Police Dept.*,
195 F.3d 553 (10th Cir. 1999) ..... 6

*City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) ..... 5

*Covington v. City of New York*, 171 F.3d 117
(2d Cir. 1999) ..... 6

*Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) ..... 4

*Harvey v. Waldron*, 210 F.3d 1008 (9th Cir. 2000) ..... 6

*Heck v. Humphrey*, 512 U.S. 477 (1994) ..... 1-2, 5-7

*Smith v. Holtz*, 87 F.3d 108 (3d Cir. 1996) ..... 6

*Stevens v. Department of Treasury*, 500 U.S. 1 (1991) ..... 3

*Virginia Bankshares, Inc. v Sandberg*,
501 U.S. 1083 (1991) ..... 3

*Washington v. Summerville*, 127 F.3d 552 (7th Cir. 1997) .. 6

*Wolfe v. Perry*, 412 F.3d 707 (6th Cir. 2005) ..... 6

# PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## I. Introduction

Respondents expressly "acquiesce" in petitioner's request that the Court review the question framed by Judge Posner in his opinion dissenting from the denial of rehearing en banc. (Br. Opp. at 5.) Respondents correctly note that the question of when a Section 1983 action for damages arising out of an unlawful arrest accrues "has divided the courts of appeals for years." (*Id.*) Accordingly, respondents join our prayer that "[c]ertiorari should be granted" (*id.* at 4), to resolve the intercircuit conflict on this important and recurring issue.

As petitioner has already explained, (Pet. 6-7), and as respondents do not dispute, this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), largely controls the answer to this accrual question. *Heck* teaches that if the unlawful arrest claim would "necessarily imply the invalidity" of a conviction, then the Section 1983 claim does not accrue until the conviction has been set aside and there is no longer any possibility of a judgment in the pending criminal prosecution.

Respondents treat the confession component of question one in the petition and the damages issue in question two as independent of the accrual issue which respondents agree warrants this Court's review.[1] They

---

1. Respondents assert that the confession component of question one was not raised in the court below. (Br. Opp. at 5.) Respondents acknowledge, however, that petitioner raised a confession claim in the court of appeals (*id.*), and recognize that the Seventh Circuit held that the confession claim should be analyzed under the Fourth Amendment,

are not. These three issues are linked by *Heck*.

As the case reaches this Court, there is no dispute that petitioner was arrested without probable cause, that respondents exploited the unlawful arrest to obtain a confession, that petitioner's conviction was reversed after the state appellate court held that the confession was inadmissible as the tainted fruit of the unlawful arrest, and that, lacking any admissible evidence, the prosecution dismissed all criminal charges. Under the fact specific analysis contemplated by *Heck*, 512 U.S. at 487, the illegality of petitioner's arrest "necessarily impl[ied]" the inadmissibility of his confession, and thereby impugned the validity of any further criminal proceedings, as the prosecution implicitly conceded when it dismissed the criminal case.

Petitioner was incarcerated for eight years as a result of the unlawful arrest before he was freed when the prosecutor dismissed the criminal case. The Seventh Circuit held as a matter of law that a wrongful arrest may only cause the harm of unlawful detention from arrest until arraignment, (Pet. App. 16-17), and that the unlawful arrest could not, under any circumstances, impugn the validity of a criminal conviction (or prosecution). These issues are presented in the two questions in the petition for writ of certiorari.

---

and on that basis was time barred. (Pet. App. 17-18.) This issue was thus raised and decided below.

The Court should reject respondents' claims of "waiver" — claims similar to those rejected by the court below. (Pet. App. 6.) Each of the questions raised in the petition for writ of certiorari was presented to and passed upon by the court below and each question is therefore properly considered by this Court. *Virginia Bankshares, Inc. v Sandberg,* 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury,* 500 U.S. 1, 8 (1991). Moreover, even respondents do not contest that the question of what damages may be recovered in a Section 1983 action arising from an unlawful arrest has divided the circuits and this Court. (Pet. at 13-16, discussing circuit split and this Court's separate and conflicting opinions in *Albright v. Oliver,* 510 U.S. 266 (1994).) The Court should therefore grant review of both questions presented.

## II. Each Question in the Petition Was Presented to and Passed Upon by the Court of Appeals

Petitioner was incarcerated for eight years because respondents unlawfully arrested him and then exploited the unlawful arrest to persuade petitioner to confess to a crime he had not committed. Petitioner argued in the court below that the entirety of his detention was unreasonable under the Fourth Amendment. (*Wallace v. Kato,* 7th Cir., No. 04-3949, Brief of Appellant at 15.)[2] Respondents answered this argument by asserting

---

2. This brief is available at http://www.ca7.uscourts.gov/efn/efns.fwx?submit=showbr&caseno=04-3949&shofile=04-3949_001.pdf, visited on May 27, 2006.

that the damages recoverable in a Section 1983 action that stem from an unlawful arrest must be limited to those "that were incurred between the time of his arrest and the time he was charged." (*Wallace v. Kato,* 7th Cir., No. 04-3949, Brief of Appellee at 28.)[3] To support this argument, respondents relied on the common law limitations for damages sought for "confinement pursuant to legal process." (*Wallace v. Kato,* 7th Cir., No. 04-3949, Brief of Appellee at 13.)

The Seventh Circuit expressly reserved in *Gauger v. Hendle,* 349 F.3d 354, 360 (7th Cir. 2003), the question of whether incarceration that begins with an arrest without probable cause continues to be unreasonable under the Fourth Amendment when the incarceration continues because of a confession that was obtained by exploiting the arrest. The court of appeals resolved this issue in this case, holding that an unreasonable seizure under the Fourth Amendment that starts with an unlawful arrest ends at arraignment. (Pet. App. 16-17.) Under the Seventh Circuit's view of the cause of action that may be brought under Section 1983 to obtain damages for an unlawful arrest, it is immaterial that the arresting officers had exploited the arrest to obtain a confession, even when, as here, the confession is false, and the arrestee is incarcerated for eight years

---

3. This brief is available at http://www.ca7.uscourts.gov/efn/efns.fwx?submit=showbr&caseno=04-3949&shofile=04-3949_004.pdf, visited on May 27, 2006.

because of that false confession. The Seventh Circuit held in this case that such post-arrest misconduct did not deprive petitioner of any rights secured by the Fourth Amendment. (Pet. App. 17.)

The explicit rejection by the Seventh Circuit of petitioner's claim that the entirety of his detention was unreasonable under the Fourth Amendment shows that question two in the petition for writ of certiorari was squarely presented to the court below. While, as the Court noted in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), "it should not be surprising" if petitioner's legal arguments are more detailed in this Court than they were in the Court of Appeals, *id.* at 120, this "does not imply that petitioner failed to preserve the issue raised in its petition for certiorari." *Id.* The Court should reject respondents' attempt to exclude from review these important questions about the definition and elements of a Section 1983 action brought after an arrest without probable cause has resulted in eight years of incarceration before the arrestee is released from custody.

### III. The Limitations on Damages and the Conflict with *Heck v. Humphrey*, 512 U.S. 477 (1994)

A second reason for granting review of question two in the petition for writ of certiorari is that consideration of the Seventh Circuit's limitation on damages is intertwined with whether its bright line rule of accrual is in conflict with the decision of this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck v. Humphrey*, the Court held that "when a state prisoner seeks damages in a Section 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the

invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."[4] 512 U.S. at 487. If, however, "the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.*

By limiting the damages recoverable from an unlawful arrest to compensation for the detention from the time of arrest to the time of arraignment, the Seventh Circuit has defined the cause of action for a violation of the Fourth Amendment to eliminate any possibility that success on a Section 1983 action could

---

4. Although *Heck* did not involve claims which would imply the invalidity of a pending criminal prosecution, the courts of appeals have without exception held that when success on a Section 1983 claim "would necessarily imply the invalidity of a conviction in the pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist." *Washington v. Summerville,* 127 F.3d 552, 556 (7th Cir. 1997). See, e.g., *Covington v. City of New York,* 171 F.3d 117, 124 (2d Cir. 1999); *Smith v. Holtz,* 87 F.3d 108, 112-13 (3d Cir. 1996); *Wolfe v. Perry,* 412 F.3d 707, 714 (6th Cir. 2005); *Harvey v. Waldron,* 210 F.3d 1008, 1014 (9th Cir. 2000); *Beck v. City of Muskogee Police Dept.,* 195 F.3d 553, 557 (10th Cir. 1999).

imply the invalidity of a pending criminal prosecution. Under the Seventh Circuit's limitation on damages, there is no need for a district court to exercise the discretion that the Court contemplated in *Heck:* if damages for an unlawful arrest end at arraignment, then a Section 1983 action seeking damages for an unlawful arrest can never challenge the integrity of a criminal prosecution.

There is no indication in *Heck* that the Court contemplated this restriction on a Section 1983 action seeking damages proximately caused by an unlawful arrest. The Court appeared to assume in *Heck* that an action to recover damages for the "'injury' of being convicted and imprisoned" could be brought after a "conviction has been overturned." *Id.* at 487 n.7.

Review of the Seventh Circuit's formulation of the elements of an action to recover damages for the deprivation of Fourth Amendment rights caused by an unlawful arrest necessarily includes the holding of the court below that the damages proximately caused by an unlawful arrest end at arraignment. The Court should reject respondents' attempt to exclude this issue from its consideration in this case.

## IV. The Seventh Circuit's Limitation on Damages Cannot Be Separated from the Accrual Question

Respodents' final attempt to limit review of the elements of a Section 1983 action arising from an unlawful arrest which the police exploit to obtain a false confession is to argue that review is premature even if the Court rejects the Seventh Circuit's bright line tolling rule. (Br. Opp. at 12.) In respondents' view, consideration of any issue about damages should be deferred until and unless petitioner proves that he was

unlawfully arrested.

Respondent's claim of prematurity overlooks the fact that the question of what damages may be recovered for the violation of the Fourth Amendment that begins with an arrest without probable cause is inextricably interwined with the question of whether the Fourth Amendment violation ends at arraignment or ends when the unreasonable seizure ended with petitioner's release from custody and the dismissal of criminal charge. Resolution of this issue cannot be fairly divorced from determination of the accrual question presented by question one in the petition for writ of certiorari.

## V. CONCLUSION

For the reasons above stated and those previously advanced, the petition for writ of certiorari should be granted.

May, 2006

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604

(312) 427-3200
*Attorney for Petitioner*